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No. 01-816

In the Supreme Court of the United States

JOE HARRY PEGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a defendant seeking reversal of his conviction based on a conflict of interest stemming from counsel's alleged involvement in conduct related to the defendant's crime must show that the conflict adversely affected counsel's performance.

2. Whether a defendant seeking reversal of his conviction based on a conflict of interest must establish a link between the conflict and counsel's failure to pursue an alternative defense strategy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B3-B15) is reported at 253 F.3d 1274. The order of the district court (Pet. App. C16-C48) is reported at 49 F. Supp. 2d 1322.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2001. A petition for rehearing was denied on August 3, 2001. (Pet. App. A1-A2.) The petition for a writ of certiorari was filed on November 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 963. Petitioner was sentenced to 360 months' imprisonment, to be followed by five years of supervised release. Petitioner did not appeal his conviction or his sentence. Petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255. The district court denied the motion, and the court of appeals affirmed. (Pet. App. B3-B15).

1. In 1981, petitioner hired attorney James Sharp to represent him on drug importation charges in Louisiana and Florida. Pet. App. B4. Sharp and petitioner became friends, and Sharp continued to represent petitioner thereafter. *Ibid.*

In March 1994, a federal grand jury charged petitioner and others with conspiring to import marijuana. Pet. App. B4. Sharp and his law partner, Tom Lankford, agreed to represent petitioner on those charges. *Id.* at B5. Petitioner retained Tampa, Florida, attorney, John Fitzgibbons, as local counsel. *Ibid.* Assistant United States Attorney (AUSA) Cynthia Collazo met frequently with petitioner's three attorneys to discuss a possible plea agreement. *Ibid.* They also discussed the likelihood that petitioner would receive a reduced sentence if he pleaded guilty and cooperated with the government. *Ibid.*

In September 1994, counsel for alleged co-conspirator Reggie Baxter informed AUSA Collazo that Sharp might have had privileged conversations with Baxter that would create a conflict of interest for Sharp in his representation of petitioner. Pet. App. B5. Collazo sent Drug Enforcement Administration (DEA) Agent

Sam Murad to interview Baxter. *Ibid.* Collazo also wrote to Sharp and Lankford to alert them to the possibility that Sharp's contact with Baxter had given rise to a conflict of interest. *Ibid.* Sharp and Lankford responded that no conflict existed. *Ibid.* Collazo then interviewed Baxter, who told her that Sharp had met with him and arranged for petitioner to pay part of his legal fees. *Id.* at B5-B6. Baxter also stated that petitioner had retained attorney Dick Hibey to represent Baxter and that Sharp and Hibey had helped him to concoct a false story in order to exculpate petitioner. *Id.* at B6.

AUSA Collazo notified petitioner's attorneys that they should alert the district court to the possibility of a conflict of interest. Pet. App. B6. Fitzgibbons told Collazo that he was prepared to try the case in the event that Sharp and Lankford were disqualified. *Ibid.* The government prepared a motion to disqualify Sharp and Lankford and faxed it to them. *Ibid.* Petitioner's attorneys decided that if Sharp testified at trial, Fitzgibbons would assume the role of lead attorney. *Ibid.* Petitioner's attorneys discussed the nature of Sharp's conflict with petitioner, and petitioner begged Sharp not to withdraw from the case. *Ibid.*

The parties appeared in court prepared to argue the disqualification motion and other pretrial motions. Pet. App. B7. Before the hearing began, however, co-defendant Bernie Getchman unexpectedly pleaded guilty. *Ibid.* During his plea colloquy, Getchman testified that petitioner had hired him to direct, organize, and control the marijuana importation operation and that he had done so at petitioner's direction. *Ibid.* The district court granted the parties a continuance until the following day to attempt to negotiate a plea. *Ibid.*

Collazo, Sharp, and Lankford agreed that a DEA agent would interview petitioner to determine whether petitioner had information that would warrant the filing of a motion for a reduced sentence. Pet. App. B7. The DEA agent told petitioner that if he cooperated with the government, the government would likely file a motion to reduce his sentence. *Ibid.* Fitzgibbons, who was familiar with the judges in the Middle District of Florida, informed petitioner's other attorneys that petitioner would likely receive a lenient sentence if he pleaded guilty, transferred his assets to the government, and cooperated in interviews with DEA. *Ibid.*

Petitioner's attorneys negotiated a written plea agreement with the government, which they brought to petitioner. Pet. App. B8. All petitioner's attorneys agreed that it would be in petitioner's best interest to plead guilty, and petitioner agreed. *Ibid.* At a plea hearing, petitioner stated that he was aware of his attorney's conflict of interest, and that he waived the conflict. *Id.* at C30. Following his plea, the government afforded petitioner several opportunities to offer assistance to the government, but petitioner was not truthful during the interviews. Pet. App. B8 The government therefore refused to move for a downward departure. *Ibid.* When petitioner learned that the government was not going to file a downward departure motion, he moved to withdraw his plea. *Ibid.* The district court denied that request. *Ibid.* Petitioner was sentenced to 360 months' imprisonment. *Id.* at B4.

2. Petitioner moved for post-conviction relief pursuant to 28 U.S.C. 2255. Pet. App. B4. Following an evidentiary hearing, the district court denied petitioner's motion. *Id.* at C16-C48.

The district court first determined that petitioner had not validly waived his right to conflict-free repre-

sentation at his plea hearing, because the district court had not explained to him the nature and the consequences of the waiver. Pet. App. C38-39. The district court next ruled that petitioner had established that Sharp had an actual conflict of interest. The court reasoned that while Baxter had falsely accused Sharp of criminal conduct, Baxter's allegations were sufficient to create a conflict. *Id.* at C40.

The district court went on to hold, however, that petitioner had failed to show that Sharp's conflict adversely affected his performance. Pet. App. C41-C42. The court found that Sharp advised petitioner to plead guilty because he believed a plea was in petitioner's interest, not because he feared public disclosure of Baxter's allegations. *Ibid.* In support of that finding, the court noted that Sharp was legitimately concerned that Getchman would testify against petitioner, that Sharp had reason to believe that petitioner would receive a more lenient sentence if he cooperated with the government, and that Fitzbiggons also advised petitioner to plead guilty. *Ibid.*

3. The court of appeals affirmed. Pet. App. B3-B15. It held that petitioner had failed to show that Sharp's conflict of interest adversely affected his performance. *Id.* at B10-B12. The court reasoned that all of petitioner's attorneys, including Fitzgibbons, had advised him to plead guilty, that Getchman's testimony "would have been devastating to [petitioner's] case," and that petitioner's assertion that Sharp advised petitioner to plead guilty to avoid public exposure of Baxter's allegations was "at best speculative." *Id.* at B12.

The court rejected petitioner's contention, based on *United States* v. *Fulton*, 5 F.3d 605 (2d Cir. 1993), that prejudice should be presumed because defense counsel was allegedly implicated in conduct related to the de-

fendant's crime. Pet. App. B13-B15. The court explained that *Fulton* recognized that prejudice should not be presumed when, as here, the district court finds the allegations of criminal conduct are false. *Id.* at B14. The court also noted that Baxter's allegations involved counsel's representation of the defendant in preparation for trial; they "did not involve a charge that counsel was involved in the crime with which defendant was charged." *Id.* at B14-B15. The court also rejected petitioner's reliance on *Fulton* because Fitzgibbons, who was conflict-free, also advised petitioner to plead guilty. *Id.* at B15.

DISCUSSION

1. Petitioner contends (Pet. 12-18) that when an attorney has a conflict of interest stemming from his alleged involvement in unlawful conduct related to the defendant's crime, prejudice should be presumed without a showing that the conflict adversely affected counsel's performance. That contention is without merit and does not warrant review.

In *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980), the Court held that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court reaffirmed that the rule for conflicts of interest is not one of "per se" prejudice. *Id.* at 692. Instead, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Ibid.* (quoting *Cuyler*, 446 U.S. at 350). Similarly, in *Smith* v. *Robins*, 528 U.S. 259, 287 (2000) (citation omitted), the

Court noted that "prejudice is presumed when counsel is burdened by an actual conflict of interest, although in such a case we do require the defendant to show that the conflict adversely affected his counsel's performance." Thus, under this Court's decisions, proof of a conflict is not sufficient by itself to presume prejudice or establish a Sixth Amendment violation. A defendant must also show that the conflict adversely affected counsel's performance.

Petitioner contends (Pet. 14) that prejudice should be conclusively presumed in cases in which a conflict stems from defense counsel's alleged involvement in unlawful conduct related to the defendant's crime because there is a greater danger in such cases that counsel's performance will be adversely affected. As *Cuyler*, *Strickland*, and *Smith* make clear, however, the requirement of showing an adverse effect on performance applies to all conflict of interest claims. The Court's uniform approach to conflict cases is sound. It is very unlikely that conflicts can be classified based on their likelihood of causing an adverse effect on performance. Cf. *Strickland*, 466 U.S. at 693 (noting that attorney errors "cannot be classified according to [their] likelihood of causing prejudice"). Indeed, petitioner offers no evidence that conflicts stemming from defense counsel's alleged involvement in unlawful conduct related to the defendant's crime are more likely than other conflicts to affect performance adversely. Even if such conflicts were more likely than others to lead to an adverse effect on performance, however, that would simply mean that the defendant should have an easier time making the required showing in such cases. It would not justify relieving a defendant of the burden of establishing that such an effect actually occurred in his case. Thus, as in other conflict cases, a defendant seek-

ing to overturn a conviction based on a conflict of interest stemming from an attorney's alleged involvement in unlawful conduct related to the defendant's crime must show that the conflict adversely affected counsel's performance.

In support of his contrary view, petitioner relies on the Second Circuit's holding in *United States* v. *Fulton*, 5 F.3d 605 (1993), that prejudice may be presumed when an attorney's conflict stems from his involvement in unlawful conduct related to the defendant's crime. But *Fulton* suggested that prejudice should not be presumed when a district court has held a hearing and found that the allegations of defense counsel's unlawful conduct are false. 5 F.3d at 613. Here, the district court conducted a hearing and determined that Baxter's allegations against Sharp were false. Pet. App. B14. Moreover, in this case, Baxter alleged that defense counsel was involved in an effort to alter testimony that might be damaging to the defendant. He did not allege that defense counsel was involved in the defendant's underlying crime. Finally, as the court of appeals noted, Fitzgibbons, who was conflict-free, also advised petitioner to plead guilty. *Id.* at B-14-B15. For those reasons, petitioner's reliance on *Fulton* is misplaced.

2. Petitioner contends (Pet. 21) that the court of appeals' holding that a defendant must establish "a link between the actual conflict and the decision to forgo the alternative strategy of defense" (Pet. App. B10) conflicts with *Cuyler*. That contention is also without merit and does not warrant review.

As noted above, *Cuyler* holds that a defendant must establish that "an actual conflict of interest adversely affected * * * his lawyer's performance." 446 U.S. at 348. That formulation—particularly the use and place-

ment of the term "affected"—makes clear that a defendant must establish a causal link between the conflict and counsel's alleged adverse performance. That understanding squares with the Court's focus in *Wood* v. *Georgia*, 450 U.S. 261 (1981), on "whether counsel was influenced in his basic strategic decisions *by the [alleged conflicting] interests.*" *Id.* at 272 (emphasis added); see *Burger* v. *Kemp*, 483 U.S. 776, 787 (1987) (considering whether "an adverse effect resulted from [the attorney's] actual conflict of interest").

Petitioner argues (Pet. 22-23) that, under the court of appeals' causation requirement, a defendant cannot prevail unless he can show that there is no plausible reason, other than the conflict, for defense counsel's failure to pursue an alternative defense strategy. The court of appeals did not adopt any such standard. Instead, it ruled against petitioner because the record firmly established that a guilty plea was in petitioner's interest and that Sharp had acted to further petitioner's interests, rather than his own. Pet. App. B11-B12. As the court of appeals explained, if petitioner had not pleaded guilty, Getchman would have testified against petitioner and "his testimony would have been devastating to [petitioner's] case." *Id.* at B12. Moreover, as the court of appeals noted, conflict-free counsel Fitzgibbons offered petitioner precisely the same advice to plead guilty as Sharp.

Petitioner contends (Pet. 24) that the court of appeals' causation requirement conflicts with the decisions in *Stoia* v. *United States*, 22 F.3d 766 (7th Cir. 1994), and *United States* v. *Mett*, 65 F.3d 1531 (9th Cir. 1995), cert. denied, 519 U.S. 870 (1996). Like the Eleventh Circuit, however, the Seventh and Ninth Circuits also require a defendant to establish a causal link between the conflict and an adverse effect on

performance. In *Stoia*, the Seventh Circuit held that a defendant "in addition to showing that [his attorney] had an actual conflict of interest, must also demonstrate how that conflict adversely affected [the attorney's] performance." 22 F.3d at 772. The court further stated that a defendant could satisfy the causation requirement by showing that there was a "reasonable probability" that counsel's actions were "dictated" by a conflict. *Id.* at 773. In *Mett*, the Ninth Circuit stated that its cases "have not set up any formal test for determining whether counsel's performance was adversely affected," but that *Cuyler*'s adverse effect prong remains "a substantial hurdle." 65 F.3d at 1535. The court found no evidence in that case that the attorney's alleged conflict "likely" caused an adverse effect on his performance. *Ibid.* Those decisions do not use precisely the same verbal formulation for the causation requirement as the Eleventh Circuit. But there is no reason to believe that the standards are substantively different or that they lead to any difference in results. That is particularly true in a case like this one, where the record establishes that defense counsel performed as he did because he believed it to be in the defendant's interest, and not because of any conflicting interest.

3. In *Mickens* v. *Taylor*, 532 U.S. 970 (2001) (No. 00-9285), this Court granted review limited to the following question: "Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?" Petitioner did not present that question in this case. Nor did he argue below that the district court failed to inquire into a potential conflict of interest about which it reasonably

should have known, or that such a failure relieved him of the burden to establish that his attorney's conflict adversely affected his performance.

Nonetheless, it is possible that the question at issue in *Mickens* is fairly included within the questions that petitioner has presented. In addition, the district court was aware of a potential conflict at the time it accepted petitioner's guilty plea. Pet. App. C30. Finally, the district court, on collateral review, found that there was not a sufficient inquiry into that conflict to secure a valid waiver of petitioner's right to conflict-free representation, *id.* at C38-C39, and the court of appeals did not disturb that finding. In those circumstances, the Court may wish to hold the present petition pending the decision in *Mickens*, and then dispose of it as appropriate in light of that decision. Alternatively, since petitioner did not present a *Mickens*-type claim in the courts below, further review may not be warranted.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Mickens* v. *Taylor*, cert. granted, 532 U.S. 970 (2001) (No. 00-9285), and disposed of as appropriate in light of that decision. Alternatively, the petition should be denied.

Respectfully submitted.

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